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# An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice\*

Patrick C. Osode\*\*

## I. Introduction

Dumping may now be fairly described as a colourful and pejorative term that is used in International Trade Regulation to refer to a practice on the part of exporters that can take either one of two forms.<sup>1</sup> The first is the sale of goods on an export market at a price below that at which identical products are sold in the ordinary course of trade in the exporter's home market;<sup>2</sup> and the second is the sale of products in an export market at prices below their production cost.<sup>3</sup> Dumping is one of many trade practices of which widespread disapproval exists in the international community.

The reasons for that widespread disapproval appear to be at least three-fold.<sup>4</sup> First, dumping is believed to produce market distortionary effects in the sense of enabling an exporter to gain market share in an importing country without necessarily being an efficient producer. In so doing, the practice runs counter to the objective of achieving an international trading system founded firmly on the global operation of the law of comparative advantage. Second, dumping is seen as unfair competi-

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1. B.M. Hoekman & M.P. Leidy, *Dumping, Antidumping and Emergency Protection*, 23 (5) J. World Trade 27 (1989); J. Devault, *The Administration of US Antidumping Duties: Some Empirical Observations*, 13 World Econ. 75 (1990).

2. Hoekman & Leidy, *supra* note 1. This practice is sometimes referred as "price dumping" or international price discrimination. *Id.*

3. *Id.* This is sometimes referred to simply as "cost dumping". *Id.*

4. J. H. JACKSON ET AL, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 671-83 (West Publishing, 1995).

tion or unfair trade because it is perpetrated by exporters who enjoy a special advantage in the sense of having a home or third country market in which sales can be made at significantly higher prices without fear of retaliation by competitors in the importing country or of arbitrage.<sup>5</sup> And third, if the anti-competitive effects of dumping are not nullified by the introduction of a trade measure designed and deliberately introduced for that purpose, it can produce overwhelmingly negative consequences for the government of the importing country, its domestic producers, and citizenry.<sup>6</sup>

However, a perusal of the legal and economic literature readily reveals a fierce ongoing debate around the desirability or wisdom of enacting and enforcing anti-dumping rules.<sup>7</sup> While the antagonists contend rather persuasively that these laws lack solid intellectual foundations and are generally in conflict with elementary principles of welfare economics,<sup>8</sup> the protagonists advance arguments largely supportive of the reasons elaborated in the preceding paragraph and their underlying assumptions.<sup>9</sup> Although the weight of academic opinion appears to favor the

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5. *Id.* at 673-75.

6. *Id.* at 680-81.

7. R. Krishna, *Antidumping in Law and Practice* (The World Bank, Policy Research Working Paper no. 1823, 1997) at 1 (noting that politicians, economists and lawyers have participated in the debate with unprecedented zeal).

8. R. DALE, *ANTI-DUMPING LAW IN LIBERAL TRADE ORDER 1 et seq.* (St. Martin's Press, 1980); R. McGee, *The Case to Repeal Antidumping Laws*, 13 NW. J. INT'L TRADE L. & BUS. 487, 491 (1993) (arguing, *inter alia*, that anti-dumping policy was designed to protect domestic industry from import competition at the expense of consumers as it only results in higher prices, lower quality products, and less consumer choice); World Trade Organisation, *Anticompetitive Effect of Antidumping Action*, available at <http://www.wto.org> (last visited May 30, 2003); M.J. Finger, *GATT Experience with Safeguards: Making Economic and Political Sense of the Possibility that GATT Allows to Restrict Imports*, available at <http://www.cato.org> (1998); B. Lindsey, *The U.S. Antidumping Law: Rhetoric v. Reality*, 34 (1) J. WORLD TRADE 1 (2000); M. Knoll, *Dump our Antidumping Law*, available at <http://www.cato.org/pubs/fpbriefts/fpb-011.html> (last visited May 30, 2003); Barcelo, *The Antidumping Law: Repeal it or Revise it*, 1 MICH. Y.B. INT'L LEG. STUD. 53 (1979); R. Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 15-17 (1995); R. Denton, *Why Should Nations Utilize Antidumping Measures*, 11 MICH. J. OF INT'L L. 224, 225 (1989); S. Hutton & M. Trebilcock, *An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales*, 24 (3) J. WORLD TRADE 123 (1990); J. Leclerc, *Reforming anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries*, 44 MCGILL L.J. 111 (1999); C.A. Conrad, *Dumping and Anti-Dumping Measures from a Competition and Allocation Perspective*, 36 (3) J. WORLD TRADE 563 (2002); J.T. de Araujo, C. Macario & K. Steinfatt, *Antidumping in the Americas*, 35 (4) J. WORLD TRADE 555 (2001).

9. B. Hoekman & P.C. Mavroidis, *Dumping, Antidumping and Antitrust*, 30 J. WORLD TRADE 1 (1996); A.Z. Szmoasszegi, *Why the United States Needs to Keep a Vigorous Antidumping Law*, available at [www.reagan.utexas.edu/resource/speeches/1902/111682c.htm](http://www.reagan.utexas.edu/resource/speeches/1902/111682c.htm) (last visited May 30, 2003); A.C. Sharkey, *Stop the Dumping but Don't Dump the Antidumping Legislation*, available at <http://www.steel.org> (last visited May 30, 2003); G. Mastel, *Existing Anti-*

antagonists, anti-dumping rules remain a prominent feature of contemporary international trade regulatory framework largely because of the immense political support they enjoy.<sup>10</sup>

Not surprisingly, dumping is one of those practices that justify unilateral introduction of trade measures by importing country governments under the applicable international trade rules. More specifically, Article VI of the 1994 General Agreement on Tariffs and Trade (GATT)<sup>11</sup> as well as the Uruguay Round Anti-dumping Agreement (AD Agreement)<sup>12</sup> authorise importing countries to impose anti-dumping duties (ADDs)<sup>13</sup> in what is commonly perceived as national economic self-defence.<sup>14</sup> Where, for example, an exporter charges a higher price in its home market, the international rules contained in the GATT as well as the AD Agreement permit the invocation of national anti-dumping rules to protect the domestic import-competing industry. Such governmental action in the form of imposing ADDs effectively compels the importer to sell at a price identical to that at which the subject goods are sold in the exporters' home market.<sup>15</sup> However, in granting such authorisation to act unilaterally, the said trade rules also impose multiple international legal ob-

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*dumping Law Serves a Vital Purpose in Aiding U.S. Steel Industry*, available at <http://www.steel.org> (last visited May 30, 2003).

10. Hoekman & Mavroidis, *supra* note 9. Because they are direct beneficiaries of the enactment and enforcement of anti-dumping laws at the national level, certain domestic industries are known to have invested substantial resources and energy on lobbying for the maintenance and strengthening of these laws. No where is this more apparent and documented than in the United States (US) and the European Union (E.U.). At the international level, anti-dumping rules have survived mainly because of the support they have received from the US and E.U. who, although a numerical minority in the World Trade Organisation (WTO), remain the dominant voices in the negotiations and debates around the reform of international trade rules. *Id.*

11. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Regarding Anti-Dumping, December 29, 1994, Uruguay-Arg., 841 U.N.T.S. 1895. available at <http://organization.tripod.co.jp/wto/ad—/ad—e0.htm>. [hereinafter AD Agreement] Art. VI(2) specifically provides that a WTO member may, in order to offset or prevent dumping, levy an anti-dumping duty on any product provided the amount of such duty is not greater than the margin of dumping in respect of such product. For the purposes of the article, the margin of dumping consists of the price difference determined in accordance with the provisions of Art. VI(1). *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Both Art. VI of the GATT and the AD Agreement are examples of support for state intervention in the operation of national economies within the new WTO framework for global trade regulation. This point is appropriately highlighted here as growing opposition from radical left-wing elements around the world to the WTO and the legal instruments it administers tends to suggest that both the institution and the said instruments are averse to the critical role of national governments as primary caretakers or overseers of matters directly connected to the economic welfare of their peoples. *Id.*

15. Brian Hindley, *The Economics of Dumping and Anti-Dumping Action: Is there a Baby in the Bath Water?*, in POLICY IMPLICATIONS OF ANTI-DUMPING MEASURES 30 (Tharakan P.K.M. Ed. 1991).

ligations on importing countries intending to deploy such measures. In terms of the content of those rules, it is remarkable that they not only contain substantive legal requirements but also set out elaborate procedural or due process obligations with which importing countries must comply or face immediate recourse to the WTO dispute resolution machinery.<sup>16</sup> In addition to meeting universal minimum standards of fairness, reasonableness, and transparency, these obligations are intended to ensure the greatest possible uniformity amongst WTO members.

In the recent case of *Board on Tariffs & Trade v. Brenco Inc. And Others*,<sup>17</sup> the South African Supreme Court of Appeal<sup>18</sup> was confronted with questions of procedural fairness in the unique context of the investigation of dumping and the imposition of ADDs pursuant to the relevant provisions of the Board on Tariffs and Trade Act<sup>19</sup> and the Customs and Excise Act.<sup>20</sup> Inevitably, the Court had to critically examine the national anti-dumping law and practice in South Africa.<sup>21</sup> Against the background of the facts and issues raised in the *Brenco Case*, this paper will seek to accomplish three closely inter-connected objectives. First, it will isolate the relevant international due process obligations of importing countries wishing to impose ADDs. Second, it will, against that background, interrogate both the provisions of the said national legislation, the practices of the South African Board on Tariffs and Trade, and the other competent authorities based thereon, as well as the SCA decision affirming the propriety and legality of the said laws and practices. Third, and perhaps most importantly, the paper will seek to identify the ways in which the relevant aspects of these South African laws and practices are either compliant with the said international obligations or contrary to same.

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16. AD Agreement, *supra* note 11. This is supported by the provisions of Art. 1 of the AD Agreement to the effect that the imposition of an anti-dumping measure shall be legal (and, therefore, acceptable within the WTO regulatory framework) only if it is done under the circumstances provided for in Art. VI of the GATT and pursuant to investigations initiated and conducted in accordance with the provisions of the AD Agreement. *Id.*

17. *Board on Tariffs & Trade v. Brenco Inc.*, 4 SA 511 (SCA 1991) available at <http://wwwserver.law.wits.ac.za/scrtappeal/2001/28599.pdf>. (last visited May 18, 2003). [hereinafter *Brenco*]

18. *Id.* at 2.

19. BOARD ON TARIFFS AND TRADE ACT 107 of 1986 [hereinafter, BTT Act].

20. CUSTOMS AND EXCISE ACT 91 of 1964 [hereinafter, CE Act].

21. B.M. HOEKMAN & M.M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM—THE WTO AND BEYOND* 28 (2001).

## II. Organisational Framework for Investigation and Imposition of ADDs

Neither the GATT nor the AD Agreement spell out elaborate requirements in this regard. While the former does no more than confer the power to levy ADDs on WTO members,<sup>22</sup> the latter simply states that decisions as to the amount of ADD to be imposed in any case belong with the authorities of the importing member.<sup>23</sup> The logical implication is that importing country governments are at liberty to institute any organisational framework for the administration of anti-dumping law as is in their sole judgment consistent with their legal and political system and their conception of efficiency in the realm of trade policy enforcement.<sup>24</sup>

In South Africa, the twin functions of investigating the existence of dumping and any resulting injury to domestic industry are vested, albeit exclusively, upon the Board on Tariffs and Trade (BTT).<sup>25</sup> It is submitted that this institutional arrangement is preferable to that which currently exists in the E.U. where the dumping and injury determinations are made by two different administrative agencies.<sup>26</sup> That preference is grounded in the fact that a substantial overlap exists between the data used for determining dumping and the data required for injury determination as well as in the commonsensical view that it is more efficient and manpower-friendly to put one team of investigators in charge of both dumping and injury.<sup>27</sup>

The BTT investigatory process is divisible into four phases: phase one, the merit investigation phase, where they try to determine whether there is evidence of dumping or a material injury based on the complaint lodged to the BTT; phase two, the provisional investigatory phase where there is opportunity to react to the complaint by means of an oral hearing or written representation or both; phase three, the final investigatory phase where all interested parties are afforded an opportunity to comment on a provisional report of the BTT; and the fourth and final phase, where the BTT finalises its report in accordance with the provisions of

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22. AD Agreement, *supra* note 11 at Art. 6.2.

23. AD Agreement, *supra* note 11 at Art. 9.1.

24. E. Vermulst, *Adopting and Implementing Anti-Dumping Laws—Some Suggestions for Developing Countries*, 31 (2) J. WORLD TRADE 5, 8-9 (1997).

25. REPUBLIC OF SOUTH AFRICA, MINISTER OF TRADE AND INDUSTRY, BOARD ON TARIFFS AND TRADE AMENDMENT BILL, Amend. § 57A. §§ 2-4 [hereafter BTT]. The Board is established for the singular purpose of promoting industrial growth within the framework of South Africa's economic policy through the conduct of investigations into matters that may affect the countries trade and industry. *Id.*

26. Vermulst, *supra* note 24, at 8.

27. *Id.*

the BTT Act.<sup>28</sup> At the conclusion of its investigation of an alleged dumping, the BTT is obligated to prepare a report, coupled with its recommendations, which are then sent to the Minister of Trade and Industry.<sup>29</sup> If this Minister is satisfied with the contents of the report and recommendation, she is empowered to act on it by requesting the Minister of Finance to impose the ADDs. The powers of the Trade Minister in this connection are narrowly defined in § 4(2) as follows:

Upon receipt of the report and recommendations referred to in subsection (1)(b), the Minister may—

- (a) accept or reject such report and recommendations, or refer them back to the Board for reconsideration; and
- (b) if he accepts the report and recommendations concerned, request the Minister of Finance to amend the relevant schedule to the Customs and Excise Act, 1964.

According to the SCA in the *Brenco Case*, the wording of the above subsection is significant in that it confers a particular and circumscribed discretion upon the Trade Minister which does not include the competence to modify either the BTT report or the terms of the accompanying recommendations.<sup>30</sup> Similarly, the provisions of §§ 55 and 56 of the CE Act, which deal with the power of the Minister of Finance to impose ADDs are, according to the SCA, deliberately and carefully crafted by Parliament such that this Minister may properly impose ADDs only in accordance with a request from the Trade Minister made in terms of § 4(2) of the BTT Act.<sup>31</sup> Accordingly, the said Ministers have no power to conduct any investigations of their own additional to that already done and concluded by the BTT.<sup>32</sup> As a result, they are neither entitled nor re-

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28. See *Brenco*, *supra* note 17 at p. 23. After the first phase if the BTT is satisfied that there are reasonable grounds for believing there has been dumping and damage, it accepts the complaint for formal investigation. That decision of the BTT is then published in the Government Gazette for general notice and interested persons are requested to complete certain questionnaires. After the second phase the information so received by the BTT is then verified and, if reasonable grounds are found to exist, a provisional decision is made in terms of which provisional ADDs may be ordered in accordance with the provisions of the CE Act during the third phase if the parties so wish, they may also submit further evidence or information by way of an oral hearing, written representations or both. For the purposes of evaluating the information collected in each of the above phases, the BTT affords opportunities to interested parties to react to facts and information relevant to the BTT inquiry as to whether or not there has been dumping and resulting material injury. *Id.*

29. *Id.* See s. 4(1)(b) of BTT read along with s. 1, BTT.

30. *Brenco*, *supra* note 17 at 14.

31. *Id.* at 15.

32. *Id.* at 14. In the court's view, this is consistent with the legislative intent to make

quired to receive written or oral representations from affected and/or interested parties.<sup>33</sup>

It is apparent from the legislative scheme that the actual decision to impose ADDs in South Africa is made at the political level of the Trade Minister.<sup>34</sup> While it has been suggested that the location of the power to impose ADDs at the political level is the best and preferred thing to do in this regard, especially for developing countries,<sup>35</sup> the reasons why that is so are not obvious. One can, however, speculate that political level decision making is preferred here because of the potential national and international legal and economic repercussions of the imposition of ADDs. Such repercussions can take the form of damage to valuable trade relationships. More frequently, they may constitute violations of obligations assumed by governments under existing treaties.<sup>36</sup>

### III. Reliance on Outside Expertise

One of the issues that arose in the *Brenco Case* was the propriety of the BTT seeking the expert assistance of the Directorate of Business Economics Investigation<sup>37</sup> in the course of carrying out its investigative function.<sup>38</sup> Specifically, members of the BEI were requested to assist the BTT with checking the information supplied by the interested parties for accuracy and providing advice as to what further information might be necessary for verification purposes. As part of the process of procuring the BEI assistance, several consultations were held between BTT investigators and members of the BEI who were supplied with certain documents and background information prior to the said consultations.

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the function of investigating anti-dumping exclusive to the BTT. That exclusive competence is justifiable given the highly technical nature of such investigations which essentially requires expertise of a specialised kind. *Id.*

33. *Id.* at 59.

34. *Id.* The actual collection of the ADDs is done by the Department of Customs and Excise which is an arm of the Ministry of Finance. The rationale here lies in the obvious similarities that exist between the collection of customs duties and the collection of ADDs. *Id.*

35. Vermulst, *supra* note 24, at 9.

36. *Id.*

37. *Brenco*, *supra* note 17 at 46-47. The directorate, which is now defunct, was a small unit of the Department of Trade and Industry (DTI) whose personnel consisted solely of cost accountants. It was used by DTI for cost-related investigations and, as such, part of its work included providing assistance and advice to the BTT on tariff issues. BEI also used to assist the DTI with cost verifications in the administration of the old export incentive schemes. The BEI personnel have now been transferred either to the BTT or to the International Inspectorate of the DTI which has effectively replaced the BEI. This information was obtained via telephonic conversation with Theuns Botha of DTI, 08 January 2002. *Id.*

38. *Id.* The assistance and advice of the BEI was sought and received in specific connection to the verification of data supplied by parties interested in the antidumping investigation. *Id.*



- (a) The respondents contended that, in this respect, the BTT breached its procedural fairness obligations on four grounds, namely:
- (b) That they were not made aware either of what consultations were held with the BEI members or of the documents and files of background information supplied to the BEI;
- (c) that they were not invited to be present during such consultations;
- (d) that they were never informed of what transpired at such consultations; and
- (e) that they were never given an opportunity to deal with any information or advice furnished by BEI to the BTT and were never afforded an opportunity to test the correctness and accuracy of such advice and information.

The SCA held that the BTT request of BEI to assist with the verification of information supplied by interested parties was another instance of the Board carrying out its investigative functions.<sup>39</sup> According to the Court, in the absence of any evidence of some vexatious or oppressive behaviour by the BTT, the due process rights claimed by the respondents were inapplicable to the steps taken by the Board in this regard.<sup>40</sup> The Court went further to establish what could be properly regarded as a general principle applicable wherever an administrative body vested with investigative powers seeks and receives, in the exercise of those powers, expert assistance from outside sources due to limitations in its own human resource capacity. According to the SCA, where such assistance is provided through consultations resulting in the coming into being of new information, an interested party can only succeed in a contention that their exclusion from the consultations violated the dictates of natural justice if it is shown that the newly-generated information materially altered the substance of the case that the party had to meet.<sup>41</sup>

The AD Agreement contains no provision proscribing recourse to outside experts, whether independent or not, capable of providing competent and credible assistance on aspects of an antidumping investigation. In fact, the procurement of such assistance appears to be fairly common practice in those developed countries, such as the U.S. and the

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39. *Id.* The SCA was clear in its conclusion that upon a proper interpretation of the BTT Act and the wide powers conferred upon the BTT, the Board had both an investigative function and a determinative or deliberative function. According to the Court, while the BTT has a general duty to act fairly, it is not obliged to discharge that duty in the same manner when performing its different functions. In other words, the nature and scope of the due process obligations foisted on the BTT by the said general duty to act fairly depends on which one of the twin functions it is performing. *Id.*

40. *Id.*

41. *Id.*

E.U., that are now considered to be sophisticated users of antidumping legislation.<sup>42</sup> Clearly, where the use of such experts is restricted to the investigatory phase,<sup>43</sup> an aggrieved party cannot obtain legal recourse at the international level through the WTO dispute resolution system solely on the basis of such expert involvement in the matter.<sup>44</sup>

#### IV. Judicial Review of ADD Determinations

The AD Agreement contains a mandatory provision that effectively requires that a WTO member state with national legislation authorizing the taking of anti-dumping measures must put in place independent judicial, arbitral or administrative tribunals capable of providing prompt review of the administrative actions relating to the said measures.<sup>45</sup> South African administrative law has always conceptualised judicial review as consisting of the power or jurisdiction of the courts to scrutinise administrative decisions and, where appropriate, to set them aside or correct them. In the apartheid era, the judicial power to intervene in the public administration of the country was found in the common law and generously construed based on liberal notions of the rule of law and separation of powers.<sup>46</sup> This is not surprising given the historical fact that South Africa received most of her administrative law principles from England at a time when Professor A.V. Dicey's theory of the rule of law was dominant in that country.<sup>47</sup>

However, contrary to the position which prevailed during the apartheid era, South Africa now boasts a constitution that, in addition to being supreme, contains an enforceable Bill of Rights. One of the rights contained in the said Bill is the right to administrative justice which is set out in § 33 of the Constitution as follows:

- (1) Every one has the right to administrative action that is lawful, reasonable and procedurally fair;
- (2) Every one whose rights have been adversely affected

42. Vermulst, *supra* note 24, at 9.

43. Brenco, *supra* note 17 at 46.

44. *Id.* In the *Brenco Case*, p.52-53, the SCA held that the BTT was not on the basis of procedural fairness obliged to provide interested parties with the opportunity to be present whenever its investigators consulted with members of the BEI, nor was it required to turn over all or any of the information made available to the BEI members in order to enable them play the said role. Similarly, the BTT was not under an obligation, on the same basis, to inform interested parties of what transpired during the said consultations or to give those parties an opportunity to deal with any information or advice furnished by BEI to the BTT. *Id.*

45. AD Agreement, *supra* note 11 at Art. 13; Vermulst, *supra*, note 24, at 9.

46. Accordingly, the courts would only permit public authorities to do what they had been empowered to do by the Parliament. C. HOEXTER & R. LYSTER, 2 THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW 73 (2002).

47. *Id.*

by administrative action has the right to be given written reasons;

- (3) National legislation must be enacted to give effect to these rights, and must
  - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - c. promote an efficient administration.

Pursuant to the mandate contained in § 33(3) of the Constitution, the South African Parliament has enacted the Promotion of Administrative Justice Act.<sup>48</sup> Cumulatively, §§ 33 and 39 of the Constitution, as well as the AJA, empower the review of administrative action either by a court of law or by an independent and impartial tribunal where appropriate with a view to protecting the rights of affected individuals, including the right to administrative justice, guaranteed in the South African constitution.<sup>49</sup> However, the AJA has become the primary avenue for securing judicial review of administrative action.<sup>50</sup> According to the Act, administrative action is restricted to decisions of an administrative nature made under an empowering provision by an organ of state or by a natural or juristic person and which adversely affect rights and have a direct, external legal effect.<sup>51</sup> All executive organs of the South African government are regarded as part of the country's public administration. Accordingly, everything done by these organs qualifies as administrative action.<sup>52</sup> It now appears pretty much certain that an organ of state or a natural or juristic person will be engaged in administrative action when:

- (a) making decisions or taking steps relating to the implementation of legislation;
- (b) exercising a public power; and/or
- (c) performing a public function in terms of an em-

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48. Section 10(1)(e) of the Promotion of the Administration of Justice Act, 2000 (Act No 3 of 2000) *available at* [http://www.doj.gov.za/policy/draftcode\\_adminconduct.pdf](http://www.doj.gov.za/policy/draftcode_adminconduct.pdf) (last visited May 30, 2003) [hereafter, AJA]. According to its preamble, the purpose of the Act is, *inter alia*, "to give effect to the right to administrative action that is lawful, reasonable and procedurally fair." *Id.*

49. HOEXTER & LYSTER, *supra* note 46, at 80-81.

50. AJA, *supra* note 48 at 17. Section 6(2) of the AJA allows intervention by the court or tribunal on any one or more of nine grounds set out thereunder. Those grounds include: (a) absence or excess of statutory authority; (b) bias or reasonable suspicion of bias; (c) procedural unfairness; (d) error of law; (e) bad faith; and (f) arbitrariness or caprice. *Id.*

51. *Id.* at 6.

52. HOEXTER & LYSTER, *supra*, note 46, at 93.

powering provision.<sup>53</sup>

In South Africa, the actions of the BTT in investigating allegations of dumping and the ministerial decisions to request the imposition of ADDs and to impose the same are clearly subject to review as administrative action under the AJA by virtue of the fact that they involve steps taken and/or decisions made in the course of implementing legislation.<sup>54</sup> Accordingly, parties aggrieved by such actions or decisions have an indisputable right to approach their local division of the High Court and, if unhappy with the outcome, as in the *Brenco Case*, can appeal to the SCA.<sup>55</sup> Against this background, it is submitted that there can be no credible suggestion that the judicial review provisions and institutions of the South African legal system fail to meet the standards of independence and efficiency contemplated by the AD Agreement.

## V. Disclosure of Information to Interested Parties

The AD Agreement stipulates that the authorities shall, whenever practicable, provide timely opportunities for all interested parties to see all non-confidential information that is relevant to the presentation of their cases and that is being used by the authorities in their AD investigation.<sup>56</sup> Further, these parties are entitled to prepare presentations based on such information.<sup>57</sup> The AD Agreement clearly allows the authorities to withhold confidential information<sup>58</sup> from an interested party unless they have received specific permission to disclose from the party submitting that information. However, the authorities must require non-confidential summaries of confidential information from the interested parties submitting such information.<sup>59</sup> Those summaries<sup>60</sup> are required to be made available to interested parties. Where it is impossible to produce non-confidential summaries from the subject information, the authorities are not obligated to disclose that information if the interested

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53. *Id.* at 91-110.

54. *See Brenco, supra* note 17. *See also* AD Agreement, *supra* note 11.

55. *Id.* Where an interested party remains aggrieved after the SCA's judgment has been handed down and is able to locate its grievance in the Bill of Rights, then the matter can be appealed further to the Constitutional Court which is the apex court in South Africa regarding matters involving the interpretation of the constitution. *Id.*

56. AD Agreement, *supra* note 11 at Art 6.4.

57. *Id.*

58. *Id.* This can either be information whose disclosure (a) would be of significant competitive advantage to a competitor; or (b) could have a significant adverse effect upon the supplier of the information or upon the person from whom the said supplier received the information. *Id.*

59. *Id.* at Art 6.5.1

60. *Id.* The AD Agreement requires each of the summaries to be of sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. *Id.*

party submitting the information for use in the AD investigation has provided a statement of reasons why summarisation is impossible.<sup>61</sup>

The South African practice in this respect is that the BTT withholds from interested parties information where confidentiality is asserted by the provider. However, such assertion of confidentiality is usually only accepted on condition that the provider supplies non-confidential summaries of the same information from which summaries are then made available to interested parties.<sup>62</sup> This practice is identical to the practice in the E.U. However, it differs significantly from the practice in the U.S. and Canada where such confidential information can be accessed by the legal representatives of interested parties pursuant to the terms of an administrative protective order.<sup>63</sup> Seeing that a leading commentator on anti-dumping law has recommended the South Africa-E.U. practice to developing countries considering the adoption of such a law,<sup>64</sup> there can be no plausible suggestion that that practice falls short of the WTO requirements in this regard.

## VI. Data Verification Visits

In all of those jurisdictions where anti-dumping laws are regularly invoked, it is standard practice for the authorities entrusted with the administration of those laws to visit the business premises of interested parties in the course of an AD investigation.<sup>65</sup> The objectives of these visits are two-fold. The first is to ensure that the interested party questionnaires have been accurately completed. Second, the visits are used by the authorities to ensure that there is a match between the information contained in the questionnaire responses and those available in the interested parties' accounting records.<sup>66</sup> While the visits to the premises of the exporters and importers are aimed at establishing the existence of dumping and the dumping margin, the visits to the premises of the petitioners/complaining local producers are essential in order to establish the existence of material injury and the cause thereof.<sup>67</sup>

A critical question that arose in the *Brenco Case* was whether the

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61. *Id.* at Art 6.5.2. According to the AD Agreement, where the authorities find that a request for confidentiality is unwarranted and the supplier of the information remains unwilling to make the information public or to authorise its disclosure in generalised or summary form, then the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. *Id.*

62. *Id.* The only exception permitted here is applicable to those cases where the confidential information is incapable of reduction to summaries that can be disclosed without a violation of the confidential character of the information. *Id.*

63. Vermulst, *supra* note 24, at 14.

64. *Id.*

65. See AD Agreement, *supra* note 11 at 17.

66. Vermulst, *supra* note 24, at 14.

67. *Id.* at 15.

BTT was obligated by the dictates of procedural fairness to provide interested parties with the opportunity to be present during the verification visits that were made in the course of the AD investigation. Both the respondent exporter and importer in that case were aggrieved by the fact that the BTT visited the premises of the petitioner/local producer without prior notification to them that such a visit was planned.

Article 6.6 of the AD Agreement mandates that importing country authorities ensure that their investigation is sufficiently robust as to satisfy them regarding the accuracy of the information supplied by interested parties upon which their findings are based. In the immediately following paragraph, the Agreement actually permits those authorities to carry out investigations in the territories of other WTO members provided they obtain the agreement of the firms concerned and notify the representatives of the government of the member in question. In the first of two annexes to the Agreement, detailed provisions are made for the procedures which are to be followed in making on-the-spot investigations pursuant to Article 6.7.<sup>68</sup> Against this background, it is submitted that while there is no provision specifically empowering the authorities to undertake data-verification via on-the-spot investigations within the national borders of the importing country, such power is clearly implicit in the language and tenor of the AD Agreement's provisions as well as those of Article VI(6) of the GATT. Indeed, such investigations are indispensable to the credibility and integrity of the data verification exercise which is itself a critical part of the AD investigatory process. More importantly though, there is no provision in the Agreement which requires the representatives of firms accused of dumping to be present when such investigations are made at the premises of the petitioners/complaining domestic producers and vice versa. Accordingly, the practice followed by the BTT in the *Brenco Case* cannot be properly said to be WTO-incompatible.

## VII. Concluding Remarks

In terms of their design and administration, the rules and principles of the WTO are intended to serve as a code of conduct effectively constraining the freedom of governments to deploy specific trade policy instruments.<sup>69</sup> More importantly, where those rules and principles permit the deployment of such measures by governments, the WTO fully expects them to do so in a manner consistent with the minimum standards

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68. AD Agreement, *supra* note 11 at Art 6.6-7. Those provisions do not confer a right upon the petitioner/domestic producer to be present during such out-of-country investigative visits. *Id.*

69. HOEKMAN & KOTESTKI, *supra* note 21, at 28.

of transparency and procedural fairness, in addition to ensuring an outcome that does not offend the WTO's foundational principle of non-discrimination.<sup>70</sup> That is the origin and rationale of the WTO provisions which have been discussed in this paper. To be sure, those provisions were designed to avoid a mischief, namely, the imposition of ADDs in a manner that makes it appear blatantly or covertly protectionist to an independent and objective observer.

In evaluating the WTO-compatibility of the procedural fairness aspects of anti-dumping law and practice in South Africa against the backdrop of the *Brenco Case*, the analysis in this paper points only to the conclusion that South African anti-dumping law and practice, at least in those narrow aspects, satisfies the requirements of the applicable WTO rules and principles. Seeing that South Africa has had a long history of using AD measures, this conclusion is perhaps to be expected. However, considering that the procedural rules contained in the AD Agreement are complex and technical and that, as such, they may present significant challenges to the investigating authorities in any importing country, South Africa should be applauded for jumping through all the hoops put in place by the WTO in this regard.<sup>71</sup>

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70. *Id.* at 29.

71. *Id.* at 329.